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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES LEMON LEWIS, Defendant and Appellant.	E030404 (Super.Ct.No. FSB027043) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Elizabeth A. Hartwig and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of assault with a firearm. (Pen. Code, § 245, subd. (a)(2).) The court found true allegations of two prior strike convictions and sentenced defendant to 25 years to life, pursuant to the three strikes law. We affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Arnold McRae, Karen Woodring, and other individuals were at the house of a man known as Uncle Bert in the early morning on January 6, 2000. There was a knock or call at the door, and McRae went to answer it.

McRae stepped out the front door onto the porch. Woodring saw an African-American man holding what looked like an umbrella. She realized the object might actually be a gun.

Woodring heard someone other than McRae say, "I oughta blow you away" or something like that. There was a struggle, and McRae came back into the house, closed the door, and braced himself against it.

A shot came through the door, and then another. McRae slumped down. Woodring saw that he had been hit and called 911. McRae sustained a gunshot wound to the head and died of complications due to the wound about a month later.

After the shooting, defendant told his girlfriend, Niketta Mosley, that he had been outside the house when McRae was shot. Defendant said "Gangster D" shot McRae. Gangster D was identified at trial as Deondre Walton.[1] At the time of trial, Walton had not been caught.

The police interviewed defendant after the shooting. Defendant first denied knowing anything about the shooting. Later, defendant gave the following account:

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[1] At other times in the record spelled D'Andre Walton.

Walton told defendant he was angry with McRae because McRae was selling drugs in Walton's territory. Walton told defendant he needed a gun. Defendant obtained a shotgun from another man for $50 and gave it to Walton.

Walton went to McRae's house with the shotgun. Defendant was nearby in a car, driven by Walton's girlfriend.

Defendant got out of the car and stood outside, watching. Walton knocked on the door. McRae answered, and the two men argued. Defendant heard two shots. Defendant, Walton, and Walton's girlfriend ran back to the car and drove away. Walton tried to give the gun back to defendant, but defendant refused to take it.

The case went to the jury on charges of murder and assault with a firearm. The jury acquitted on first degree murder, deadlocked on lesser offenses of second degree murder and voluntary manslaughter, and convicted on assault with a firearm.

II

DISCUSSION

A. *Sufficiency of Evidence of Aiding and Abetting*

The prosecution proceeded against defendant on a theory of aiding and abetting. Defendant argues there was insufficient evidence to convict him as an aider and abettor because there was no evidence that, when he got the shotgun and gave it to Walton, he knew Walton intended to shoot McRae. Similarly, he claims there was no evidence that he found out Walton was angry with McRae before he got the gun.

In considering a claim of insufficient evidence, we review the entire record in the light most favorable to the judgment to determine whether there is substantial evidence -- evidence which is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Where the People rely primarily on circumstantial evidence, "'[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*Ibid.*)

Here, the jury reasonably could infer defendant provided the shotgun to Walton with the knowledge that Walton planned to assault McRae and that defendant intended to facilitate the assault. It stood to reason that defendant would not obtain a shotgun for Walton without some idea of what Walton intended to do with the gun. Moreover, there was evidence defendant knew something might happen at the time he got the gun. Defendant told the police that he gave a man referred to as "Popskie" $50 for the shotgun. When asked whether Popskie told him to bring the gun back, defendant said that he told Popskie, "[I]f I don't bring it back . . . something probably then happened."

The fact defendant accompanied Walton's girlfriend to the house, and got out of the car while the shooting was taking place, also reasonably could have been interpreted by the jury as evidence defendant knew the shooting was going to happen and intended to facilitate its commission. And the fact defendant initially denied any knowledge of the circumstances of the shooting supported a reasonable inference that he had a consciousness of guilt due to his involvement in the crime. Although these facts could have been interpreted in other ways as well, as noted *ante* we are bound to accept the jury's interpretation as long as it is reasonably supported.

We cannot say no reasonable trier of fact could have found beyond a reasonable doubt that defendant obtained the shotgun with the knowledge that Walton intended to use it to assault McRae and that defendant intended to facilitate the assault. Consequently, we find the evidence sufficient to sustain the judgment.

B. *Prior Assault Conviction as a Strike*

At the time of the offense in this case, assault with a firearm was only a serious felony for purposes of the three strikes law if the defendant personally used a firearm. (Pen. Code, § 1192.7, subd. (c)(8); compare Pen. Code, § 1192.7, subd. (c)(31), added March 7, 2000 [assault with a deadly weapon is now a serious felony in all cases].) Defendant contends the record of his 1995 prior conviction for assault with a firearm, which was one of the strike convictions on which his three strikes sentence was based, did not show he personally used a firearm.

The court found defendant had personally used a firearm based on the fact defendant was the only charged defendant in the prior case and on police reports contained in the case file which described the assault. One of the reports stated that the victim said defendant came to her house with a semiautomatic weapon in his hand and threatened her while brandishing the gun.

The parties stipulated that the court could take judicial notice of the file of the prior case. However, defendant contended, and contends now, that the court could not rely on the facts stated in the police reports because the statements were inadmissible hearsay.

We reject defendant's hearsay argument, for two reasons. First, in addition to the victim's statement, the police reports also contained the first-hand report of an officer who responded to the scene of the assault. He stated that, when the officer arrived, defendant immediately walked over to a

female and put both hands on her waist. The officer then contacted the female and found a semiautomatic handgun in her waistband.

This evidence was admissible under the official record exception to the hearsay rule (Evid. Code, § 1280) because it was based on the officer's personal observation. (*Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 639.) The evidence supported a reasonable inference that defendant had possessed the gun immediately before the officer arrived. Conversely, there was no evidence suggesting anyone else at the scene had possessed the gun. Therefore, the officer's observation supporting an inference that defendant had the gun, coupled with defendant's admission via his guilty plea that he had committed assault with a firearm, was substantial evidence supporting the court's conclusion that defendant must have personally used the gun.

Our second reason for rejecting defendant's hearsay argument is that even the statement of the victim herself, expressly identifying defendant as the gunman, was not inadmissible under the circumstances here. The victim's statement was not admissible as an official record since the victim had no official duty to record her observations. (*Gananian v. Zolin, supra,* 33 Cal.App.4th at p. 640) But defendant effectively admitted the truth of the statement in his guilty plea to the 1995 assault. The reporter's transcript of the plea, which was admitted into evidence in this case, showed that defendant's counsel in the 1995 case stipulated that the police reports contained a factual basis for the plea.

In *People v. Otto* (2001) 26 Cal.4th 200, the defendant in a sexually violent predator proceeding had pled no contest to prior sex crimes. When he entered the plea, the defendant had stated that the factual basis for the plea was contained in the police reports. The Supreme Court stated that the plea "admitted the truth of the victims' statements." (*Id.* at p. 211.)

Similarly, in *People v. Sohal* (1997) 53 Cal.App.4th 911 (*Sohal*), the transcript of the defendant's plea to assault with a deadly weapon in a prior case showed that his counsel had agreed the prosecution would be able to prove certain facts stated by the prosecutor at the hearing, including the fact the defendant had personally used a deadly weapon. In his later prosecution under the three strikes law, the defendant claimed the prosecution had not shown the assault conviction was a strike, because the prosecutor's statement of the facts in the prior case was inadmissible hearsay. The court rejected the argument, holding the defendant "made an adoptive admission of the truth of the facts underlying the plea on the prior." (*Id*. at p. 916.)

Defendant attempts to distinguish *Sohal* in that, in *Sohal*, defense counsel expressly agreed the prosecution would be able to prove the defendant personally used a weapon. Here, in contrast, defense counsel merely agreed the police reports contained a factual basis for the plea. Defendant pled guilty only to assault with a firearm, not to personal use of a firearm. Therefore, defendant asserts, his counsel's stipulation was not an admission that defendant personally used the gun.

We are not persuaded that this distinction between *Sohal* and the present case is significant. The victim's statement in the police reports in this case unequivocally identified defendant as the gun user. One could not derive a sufficient factual basis from the reports for a guilty plea to assault with a firearm without crediting the victim's statement. Otherwise, there would be no factual basis for concluding an assault had occurred at all.

As a matter of logic, therefore, defendant could not stipulate that the victim's statement was true insofar as it showed he committed assault with a firearm, but claim it was untrue insofar as it showed he personally used the gun. We therefore conclude that, by stipulating that the police reports contained a

factual basis for his guilty plea, defendant admitted the truth of the victim's statement as set forth in the reports. The court properly relied on that admission in finding the 1995 conviction qualified as a strike.

C. *Right to Jury Trial on Prior Convictions*

Defendant waived a jury trial on his prior convictions. When he did so, he was advised that, if he demanded a jury trial, the only thing the jury would be asked to decide was whether the prior convictions occurred and that the court would decide whether the convictions were strikes in any event.

Defendant claims his waiver was invalid, because he was improperly advised he did not have the right to a jury trial on whether his 1995 conviction for assault with a firearm involved personal use of a firearm. Defendant asserts that, in fact, he had a federal constitutional right to have a jury decide that issue.

Defendant relies on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 486-490 [120 S.Ct. 2348, 2361-2362, 2366, 147 L.Ed.2d 435] (*Apprendi*). In *Apprendi*, the United States Supreme Court held a defendant was constitutionally entitled to a jury trial on the question of whether he had committed his crime out of racial motivation, so as to be subject to a sentence enhancement under a state "hate crime" statute. The court reasoned that racial motivation was, in effect, an element of the crime, not just a sentencing factor which could be determined by the court without a jury. It stated: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490 [120 S.Ct. at pp. 2362-2363].)

The California Supreme Court considered the effect of *Apprendi* in *People v. Epps* (2001) 25 Cal.4th 19 (*Epps*). In *Epps*, the trial court had denied the defendant a jury trial on prior conviction

allegations charged under the three strikes law and other statutes. The Supreme Court noted it had held, prior to *Apprendi*, that there was no right to a jury trial on whether an alleged prior conviction qualified as a strike. (*People v. Kelii* (1999) 21 Cal.4th 452, 457.) The *Epps* court found "no reason to retreat from" that conclusion. (*Epps, supra*, at p. 27.)

However, the *Epps* court left open the possibility *Apprendi* might require a jury trial on certain facts relating to a prior conviction allegation, other than the fact of the conviction itself. The court cited as an example of such a fact the issue of whether a prior conviction qualified as a "serious" felony for enhancement purposes. The *Epps* court stated: "We do not now decide how *Apprendi* would apply were we faced with a situation like that at issue in *Kelii,* where some fact needed to be proved regarding the circumstances of the prior conviction -- such as whether a prior burglary was residential -- in order to establish that the conviction is a serious felony." (*Epps, supra*, 25 Cal.4th at p. 28.)

Defendant contends the issue he raises, whether his prior conviction involved personal use of a firearm, is the kind of issue left open in *Epps* and which requires a jury trial under *Apprendi*. We are not aware of any published authority discussing whether *Apprendi* requires that a jury decide whether a prior conviction involved personal use of a firearm. One recent decision, however, is instructive by analogy.

In *People v. Thomas* (2001) 91 Cal.App.4th 212 (*Thomas*), the defendant was found to have served two prior prison terms pursuant to Penal Code section 667.5, subdivision (b). Defense counsel had waived the right to a jury trial on the prior prison term allegations, but the defendant had not personally waived the right.

On appeal, the defendant argued he had been denied his right to a jury trial. As does defendant in this case, the defendant in *Thomas* relied on the statement of the court in *Apprendi* that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490 [120 S.Ct. at pp. 2362-2363].) The *Thomas* defendant argued that more than the "fact" of the prior convictions was at issue in his case, because the prosecution had to show not only that he had suffered prior convictions, but also that he had served prison terms for them. He contended he was entitled to a jury trial on that issue. (*Thomas*, *supra*, 91 Cal.App.4th at p. 216.)

The *Thomas* court rejected the defendant's argument. The court based its reasoning principally on *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] (*Almendarez-Torres*), a decision which predated *Apprendi*. In *Almendarez-Torres*, the defendant was convicted of violating a statute which prohibited an alien from entering the United States after having been deported. His sentence was increased, beyond the statutory maximum, under a separate statute which provided for an increased sentence if the original crime for which the alien was deported was an aggravated felony. The defendant pled guilty and admitted three prior convictions for aggravated felonies. However, he claimed the government was required to charge in the indictment that he had suffered a prior conviction for an aggravated felony.

The United States Supreme Court disagreed, stating: "We conclude that the subsection is a penalty provision which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government

to charge the factor that it mentions, an earlier conviction, in the indictment." (*Almendarez-Torres*, *supra*, 523 U.S. at pp. 226-227 [118 S.Ct. at p. 1222].)

In support of its conclusion, the court emphasized that the factor used to increase Almendarez-Torres's sentence was recidivism. It stated that "prior commission of a serious crime" was "as typical a sentencing factor as one might imagine." (*Almendarez-Torres*, *supra*, 523 U.S. at p. 230 [118 S.Ct. at p. 1224].) Recidivism "'does not relate to the commission of the offense, *but goes to the punishment only*, and therefore . . . may be subsequently decided.' [Citation.]" (*Id.* at p. 244 [118 S.Ct. at p. 1231].)

Significantly for our purposes, the defendant in *Almendarez-Torres* argued not only that the prior conviction for an aggravated felony had to be charged in the indictment, but also that it had to be proved to a jury beyond a reasonable doubt. The court rejected this argument too, finding insufficient support for it in the court's precedents or elsewhere. (*Almendarez-Torres*, *supra*, 523 U.S. at p. 230 [118 S.Ct. at p. 1224].)

The court in *Apprendi* stated it was "arguable" that *Almendarez-Torres* was wrongly decided. However, the court declined to revisit the validity of the decision, treating it instead as a "narrow exception" to the general rule that facts which increase the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 489 [120 S.Ct. at p. 2362].) The court explained that the due process concerns that were implicated in *Apprendi* were not present in *Almendarez-Torres*, because the fact used to increase punishment in *Almendarez-Torres* was a conviction in a *prior* proceeding where the defendant had enjoyed due process protections, not a fact at issue in the current proceeding which the judge

determined without a jury, as in *Apprendi*. (*Apprendi, supra,* at p. 488 [120 S.Ct. at p. 2362].) As the court explained, "recidivism 'does not relate to the commission of the offense' itself . . . . [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." (*Id*. at p. 496 [120 S.Ct. at p. 2366].)

The court in *Thomas* considered *Apprendi*'s discussion of *Almendarez-Torres* and later decisions construing both *Almendarez-Torres* and *Apprendi*. The *Thomas* court noted that other courts had uniformly concluded *Apprendi* did not overrule *Almendarez-Torres*. In addition, appellate courts had held that *Apprendi* "does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself." (*Thomas, supra,* 91 Cal.App.4th at p. 222.) As the *Thomas* court noted, *Almendarez-Torres* itself involved allegations going beyond the mere fact of conviction, since the government had to prove not only that the defendant had suffered a prior conviction, but also that the conviction had been for an aggravated felony. (*Thomas, supra,* at p. 223.)

Therefore, the *Thomas* court concluded, *Almendarez-Torres* remained the controlling authority in cases involving "recidivism findings which enhance a sentence and are unrelated to the elements of a crime . . . ." Under *Almendarez-Torres*, such findings did not require full due process treatment. (*Thomas, supra,* 91 Cal.App.4th at pp. 222-223.) The *Thomas* court held that, although the findings at issue in *Thomas* -- that the defendant had suffered prior prison term convictions -- involved issues other than the mere fact of conviction, those other issues were not related to the

elements of the current offense. Therefore, there was no constitutional right to a jury trial under *Apprendi*. (*Thomas*, *supra*, at p. 223.)

We find *Thomas*'s analysis persuasive and believe it warrants the same result here. Like the allegations at issue in *Almendarez-Torres* (i.e., that the prior conviction was for an aggravated felony) and in *Thomas* (i.e., that the defendant had served prior prison terms), the allegation at issue here related to a prior conviction rendered in a proceeding in which defendant enjoyed full due process protections. The allegation was not related to the elements of the current offense. Under *Almendarez-Torres* and *Thomas*, such an allegation carries no constitutional right to a jury trial even though it may require the determination of facts beyond the fact that the defendant suffered the prior conviction.

Therefore, notwithstanding *Apprendi*, we conclude defendant had no constitutional right to have a jury decide whether his prior conviction involved personal firearm use. Hence, he was not improperly advised when he waived a jury trial on the prior conviction allegations, and the waiver was not invalid.

III

DISPOSITION

The judgment is affirmed.

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RICHLI

Acting P.J.

We concur:

WARD

J.

GAUT

J.